



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: BlueStar Battery Systems Corporation

File: B-270111.2; B-270111.3

Date: February 12, 1996

Alan Grayson, Esq., and Victor Kubli, Esq., for the protester.

Richard J. Bednar, Esq., Crowell & Moring, for Saft America Inc.; Norman A. Steiger, Esq., for Power Conversion, Inc., intervenors.

Richard A. Couch, Esq., Vera Meza, Esq., and John J. Reynolds, Esq., Department of the Army, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Army properly restricted urgent procurement for large quantities of batteries to power various types of portable communications-electronics equipment essential to accomplishing the Army's battlefield mission to the only two manufacturers that had supplied the batteries to the Army under previous contracts, where: (1) the Army reasonably believed those offerors were the only manufacturers that would have a high probability of delivering quality batteries in a timely manner; and (2) the protester, which was excluded from the competition, had never manufactured the batteries for the Army and had only supplied relatively small quantities of the batteries to the Government of Canada.

DECISION

BlueStar Battery Systems Corporation protests the Department of the Army's decision to exclude it from the competition under invitation for bids (IFB) No. DAAB07-95-B-G346, for supplying batteries used in military applications.¹

We deny the protest.

The Army's Communications-Electronics Command (CECOM) issued the IFB on September 20, 1995, orally soliciting bids for supplying 408,000 BA-5590/U nonrechargeable lithium sulfur dioxide batteries from Saft America Inc. and Power

¹BlueStar is a Canadian firm which, if allowed, would have submitted a bid through the Canadian Commercial Corporation pursuant to Defense Federal Acquisition Regulation Supplement § 225.870-3 (DAC 91-3).

Conversion Inc. (PCI), the only two firms that had produced the battery for the Army previously. The BA-5590/U battery is a small, lightweight battery that can provide high power output over a wide temperature range. It is the primary power source for approximately 50 different types of portable communications-electronics equipment² used by soldiers, many of which are essential to the Army's ability to accomplish its battlefield mission.

Both Saft and PCI submitted bids by September 25. Saft's total bid price was \$16,870,800 and PCI's was \$21,750,480. After pre-award surveys were conducted on both offerors, the contracting officer determined that PCI was responsible but Saft was not and, on September 30, the contract was awarded to PCI.

BlueStar filed its protest in our Office on October 10, alleging that the agency improperly failed to solicit a bid from it even though BlueStar had previously expressed to the Army its desire to compete in procurements for BA-5590/U batteries,³ and that CECOM knows BlueStar is an experienced, responsible battery producer. The protester points out that as recently as July 1995 it had expressed to CECOM its interest competing in a procurement for BA-5590/U batteries and in fact had received a copy of the solicitation from the agency. BlueStar also contends that the agency was aware that it presently makes the BA-5590/U battery for the Government of Canada.

²For example, the battery is the power source for the SINGARS (Single Channel Ground-Air Radio System) tactical radio.

³On October 24, BlueStar filed a supplemental protest alleging that CECOM improperly determined that its need for the batteries was of such an unusual and compelling urgency that it was justified soliciting bids from only two sources under the authority of 10 U.S.C. § 2304(c)(2) (1994). BlueStar argued that the large quantity of batteries being purchased and the extended delivery schedule show that the procurement is not urgent; alternatively, BlueStar argues that any urgency resulted from CECOM's lack of advance planning. The record shows that BlueStar knew all of the facts needed to form the basis for protest, including the fact that the agency had limited the competition to the two prior producers based on the urgency of the requirement, on September 29, when it discussed them with the contracting officer. Under section 21.2(a)(2) of our Bid Protest Regulations, 60 Fed. Reg. 40737, 40740 (Aug. 10, 1995)(to be codified at 4 C.F.R. § 21.2(a)(2)), BlueStar was required to protest the urgency determination within 14 days after that date. As BlueStar did not file its supplemental protest until 25 days later, the protest is untimely as to that issue.

The Competition in Contracting Act of 1984 (CICA) provides for the use of noncompetitive procedures where the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2). This authority is limited by the CICA provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as practicable. An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work properly within the available time, and we will object to the agency's determination only where the decision lacks a reasonable basis. Equa Indus., Inc., B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96; see also Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7. In this regard, a military agency's assertion that there is a critical need related to human safety and national defense carries considerable weight. See Equa Indus., Inc., supra; Dash Eng'g, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363.

We believe the Army reasonably restricted the competition to the only two firms (Saft and PCI) that had previously supplied the batteries to the Army.

The record shows that, during the summer of 1995, CECOM was planning to initiate a procurement (dubbed the NextGen or Next Generation procurement) at the end of 1995 to purchase more than a dozen different types of high performance batteries, including the BA-5590/U, under several multi-year contracts. Recognizing that the NextGen acquisition approach was fairly complicated and would take considerable time to complete, CECOM issued a competitive IFB⁴ to fulfill the Army's needs for BA-5590/U batteries in the interim.

After the interim IFB was issued, several unanticipated changes greatly increased the Army's need and the urgency for BA-5590/U batteries. Among other things, the Simulated Area Weapons Effects/Multiple Integrated Laser Engagement Systems Vest (SAWE/MILES) II program was initiated; large numbers of the vests, which are used for training soldiers and which are powered by BA-5590/U batteries, were put into the field. The agency also experienced unforeseen problems in developing the NextGen acquisition approach and in obtaining the high-level approvals required to implement the program. Finally, and most importantly as far as this protest is concerned, the Army observed a dramatic increase in the number of incidents involving "venting" of BA-5590/U batteries manufactured by Saft and PCI during the past few years.

⁴IFB No. DAAB07-95-B-G328 for 190,000 BA-5590/U batteries was advertised in the Commerce Business Daily on July 27, 1995.

A venting is the operating of the cell's vent mechanism; it occurs when the cell's internal pressure increases above normal operating parameters. Each battery cell has a venting mechanism (i.e., a weak spot in the cell container) that allows the controlled release of toxic materials when the cell's internal pressure gets too high. Because of the gravity of the venting problem--the release of toxic materials endangers soldiers⁵ using the equipment--CECOM froze its entire inventory of BA-5590/U batteries during the summer of 1995 while it endeavored with the manufacturers to ascertain the cause and devise a remedy.⁶

After a preliminary investigation, CECOM was unable to determine the reason for the Saft battery venting, although it believed it had found the cause of PCI battery venting and could remedy that problem. The agency decided not to release Saft's batteries to the field, and to release PCI batteries only after they were inspected for defects. As a result, CECOM was faced with a greatly increased need for the batteries in the field, delay in initiating the NextGen acquisition, and an inventory that could not immediately be used because of possible venting.

CECOM determined that quality BA-5590/U batteries therefore were urgently needed. After initially considering awarding a contract to PCI on a sole-source basis, the agency decided to issue the present IFB to the only two prior suppliers, Saft and PCI, using an accelerated procedure. By that time, CECOM reports, it believed it would be able to solve the Saft venting problem and would be able to control how the Saft batteries were used to ensure the safety of troops in the field.

Thus, when it issued the solicitation in issue CECOM was faced with critical shortages of batteries that are essential to the Army's battlefield mission, and the agency believed it had corrected the problems it had been experiencing with PCI's batteries, and could correct the problems with Saft's batteries. In such circumstances, we think it was reasonable for the agency to limit the competition to

⁵Many of the incidents were reported as violent venting in which the battery cell explodes, releasing toxic materials, including sulfur dioxide gas and liquid acetonitrile. Inhalation of sulfur dioxide gas causes severe respiratory irritation, and exposure to acetonitrile electrolyte can cause severe irritation to the eyes and skin. Most of the reported venting occurred in 1995.

⁶Since 1992, 46 ventings involving Saft batteries were reported, of which 36 were "violent." A violent venting occurs under extreme conditions in which the cell's internal pressure increases so fast that the vent mechanism is overwhelmed and the cell itself explodes. Twenty-five Saft venting occurred in 1995. Only five incidents involving PCI's batteries have been reported, involving dead or leaking cells.

the only firms that had made the batteries for the Army in the past while working with both firms to solve the venting problems.⁷ See Hercules Aerospace Co., supra.

In this regard, while BlueStar had produced other batteries for the agency in the past and had expressed interest in competing for BA-5590/U contracts, BlueStar had not produced even one battery of this type for the Army. CECOM points out that, in view of the concern with safety of soldiers using the batteries, BlueStar therefore would have been required to pass first article testing, which would normally delay first deliveries by about 3 months, assuming no technical problems arose. Furthermore, the contracting agency states that its experience with first time producers of lithium batteries has been that they inevitably encounter technical and production difficulties at the outset.

We note that BlueStar claims to have produced BA-5590/U batteries for another buyer, and the contracting officer confirms that the firm has a contract with the Government of Canada. However, the contracting officer also points out that CECOM does not know whether the batteries supplied to Canada will be made to the same specifications as will be required of PCI here; the contracting officer also points out that the present procurement calls for delivery of up to 37,000 units per month while the Canadian contract requires a total delivery of only 8,000 units per year. Additionally, the record shows that, after reviewing BlueStar's own product literature and meeting with BlueStar representatives, agency procurement personnel had grave doubts concerning whether BlueStar had the capability to produce sufficient quantities of batteries to meet the agency's urgent delivery schedule. In light of the critical inventory shortages, the recent venting problems, CECOM's legitimate concern about soldiers' safety, and BlueStar's lack of experience with producing this particular battery, we have no reason to question CECOM's decision not to invite BlueStar to compete.

The protest is denied.

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⁷After several additional Saft venting were reported and a negative pre-award survey on Saft, the contracting officer determined Saft to be nonresponsive and awarded the contract to PCI.